

# United States Circuit Court of Appeals

For the Ninth Circuit

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NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,  
*Appellant and Cross-Appellee,*

VS.

TWOHY BROTHERS COMPANY, a Corporation,  
*Appellee and Cross-Appellant.*

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Upon Appeal from the United States District  
Court for the District of Oregon

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ANSWERING BRIEF OF CROSS-APPELLEE

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No. 8594

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## JURISDICTION

The jurisdictional requisites both in the District Court and in this Court were set out fully in appellant's brief, upon its own direct appeal, and we assume need not be restated here.

## STATEMENT OF THE CASE

(To avoid confusion, the parties will be referred to as plaintiff and defendant, respectively, as they appeared in the Court below. Twohy Brothers Company, appellee and cross-appellant, was plaintiff, and Northern Pacific Railway Company, appellant and cross-appellee, was defendant.)

Plaintiff's opening brief, in support of its cross-appeal, begins with what is termed a "statement." (Cross-Appellant's Opening Brief, p. 2.) If this is intended as the statement of the case required by Rule 1 (c), we cannot accept it as an adequate or fair explanation of the litigation.

The references made to the record will show that to a considerable extent what appear as statements of fact are in truth contentions as to which some evidence was introduced. Plaintiff's bill of exceptions made no attempt to include the evidence, in condensed and narrative form, upon which the trial court acted in disposing of these contentions. For the most part, plaintiff thought it sufficient merely to indicate by its bill of exceptions that there was some evidence tending to prove what it claimed (R. pp. 286-290, 298-311).

This form of stating the evidence was defended in the Court below upon the ground that where the



error claimed went merely to the rejection of testimony, it was only necessary to show, in the bill of exceptions, that there was some evidence in the record tending to establish the contentions as to which the rejected testimony was thought to be relevant.

If plaintiff's bill of exceptions is sufficient for this purpose, its recitals of what the evidence tended to show should be understood as such. They are not available in support of the other three points discussed in the brief (Cross-Appellant's Opening Brief, pp. 6-8); and since, in large part, they give but one side of sharply disputed issues of fact, they are not well adapted to an explanation the purpose of which is to make clear what these issues are and what questions they present.

An explanation of the issues made by the pleadings in the case, of the disposition of them by the trial court, and of the questions here involved, as presented by defendant's appeal, appears in the brief heretofore filed on behalf of defendant (Brief of Appellant, pp. 3-15). We supplement this with an explanation of the questions sought to be raised upon plaintiff's cross-appeal.

### I. Change of Work Claim

Much evidence was offered upon the different questions involved in this claim at the hearing upon the reference to an Auditor. Objections to testimony were noted but not passed upon. At the trial in the District Court the parties presented no additional testimony; the evidence given by each witness before the Auditor was introduced, but because of the length of the transcript, the testimony was not in fact read, the parties stipulating that all objections made before the Auditor should be considered as made at the trial, the Court to pass upon them when deciding the case (R. pp. 178-179).

The District Court held that plaintiff was not entitled to recover upon the change of work claim. Special findings were made against plaintiff's contentions upon the questions of fact involved (R. pp. 159-164). No formal rulings were made upon any question of admitting or rejecting testimony (R. pp. 159-173).

Plaintiff's contention here is that the Court's decision included a ruling which rejected certain evidence "as representations of the amount and character of the work to be done by the contractor," and that this ruling was erroneous (R. p. 291).



## II. Commercial Haul Claim—Duration of Contract

The District Court interpreted the contract as entitling plaintiff to conduct the transportation operations involved in the moving of the log traffic which defendant handled from the time it took possession of the first 29 miles of the line until the date specified in the construction contract for the completion of the work; and the Court concluded that defendant's action in handling this traffic itself was a breach of the contract (R. pp. 164-168).

Plaintiff's work on the remainder of the line continued until October 25, 1927. The contention here made is that the District Court erred in holding that no issue was made by the pleadings as to whether anything done by defendant operated to extend the period for commercial haul, beyond the contract date, September 1, 1927 (R. pp. 169-170, 377-382).

## III. Commercial Haul Claim—Allowance of Interest

The District Court found that plaintiff was damaged in the sum of \$125,000 as the result of the alleged breach of contract between July 17, 1927, and September 1, 1927. Upon this finding the Court awarded plaintiff the sum of \$125,000 without interest prior to judgment (R. p. 173).

The contention here made is that the District Court erred in not including interest from February 1, 1928, upon the award of \$125,000 for the alleged breach of contract (R. pp. 322, 324, 383-384).

#### IV. Bridge Material Claim

The District Court interpreted the contract as entitling plaintiff to payment for hauling bridge materials, whether transported by rail or otherwise, at the prices specified for hauling by Items 37, 38, and 39 of the contract, and that the refusal to pay at these rates was a breach of the contract (R. pp. 170-171). As damages, the Court awarded what would have been payable at these rates for all the material transported, less what had been actually paid by defendant, without interest prior to judgment (R. p. 173).

Plaintiff's contention here is that interest from February 1, 1928, upon the award made for the alleged breach of contract, should have been included (R. pp. 327, 384-385).

## ARGUMENT

## I

## CHANGE OF WORK CLAIM

1. *Plaintiff's Assignment of Error No. I presents no question for review here because plaintiff seeks no relief with respect to the judgment of the District Court upon the Change of Work claim.*

Plaintiff's Assignment of Error No. I asserts that the District Court erred in refusing to receive certain testimony. It is said in the Assignment that the Court "qualifiedly sustained the objections to plaintiff's offers of the letter of invitation (from the Railway Company to prospective bidders), the Chamberlin profile and the description of the proposed line;" (R. pp. 376-377). And plaintiff's brief explains, as to this Assignment, that "only the admissibility of evidence of the job upon which plaintiff bid," is to be discussed. (Cross-Appellant's Opening Brief, p. 10.)

Plaintiff excepted to each of the special findings of the District Court which determined that plaintiff had failed to prove the allegations of its complaint as to the change of work claim. Exceptions were also taken to the refusal to make requested findings and conclusions which would have determined the merits of this claim in plaintiff's favor (R. pp. 291-317). But the assignment of error upon which plaintiff

comes to this Court does not challenge the correctness of the findings entered or of the conclusion that plaintiff is not entitled to recover. The assignment is limited to the alleged error in refusing to receive and consider certain testimony.

As we shall presently point out, there was no such ruling by the District Court, and there is no basis for the exception taken or for the assignment here relied upon. But if the District Court had in fact excluded competent evidence, what does plaintiff think this Court should do about it? Error in refusing to admit competent testimony in an action at law may warrant reversing the judgment of the trial court, and may entitle the aggrieved party to a retrial of the cause. If that is the purpose of plaintiff's cross-appeal, defendant will join it in requesting this Court to set aside the judgment entered in the District Court.

Plaintiff of course was careful to make no such request. In attempting to comply with the statutory requisite for a prayer for reversal (28 U. S. Code Ann. Sec. 862), plaintiff concluded its Assignments of Error thus (R. p. 386):

“Wherefore appellant prays that the judgment of said District Court of the United States

for the District of Oregon be reversed insofar as it refused to award judgment as prayed in plaintiff's complaint."

We do not stop here to inquire whether a cross-appeal will ever lie in an action at law where the cross-appellant seeks to amend rather than to set aside the judgment of the trial court,—whether a party appealing has a right "to hold onto his present recovery, and, without jeopardizing that, to try to increase it." *Empire Fuel Co. v. Lyons*, 257 Fed. 890, 898. As to plaintiff's Assignments other than Assignment No. I, the prayer for reversal above quoted is at least understandable; plaintiff seeks to have this Court, upon the record before it, increase the amount awarded by the judgment of the District Court.

This is not true of Assignment No. I. This assignment asserts merely that the District Court should have received and considered certain evidence which might have influenced the Court to decide the change of work claim differently. If this Court were to so determine, what is plaintiff's remedy? A number of questions of fact are involved. If we indulge in the unwarranted assumption that the excluded evidence should have induced a finding that the work contracted for was changed, what was the effect of that



change? If it was increased, was the additional volume, paid for on a unit price basis, advantageous or disadvantageous to the contractor? Did the Engineer make any finding on the subject, as required by the contract, and finally, if plaintiff's rights were infringed, what are the damages to which it is entitled?

Plaintiff's bill of exceptions does not profess to include the evidence upon which the District Court determined these fact issues against it (R. p. 344); and its brief makes no claim that the District Court's findings are to be reviewed here. (Cross-Appellant's Opening Brief, pp. 9-17, 41.) There is nothing in the Assignment itself or in the argument made in its support, to suggest that any action is expected of this Court, if it should find the Assignment well taken. We submit, therefore, that the Assignment presents nothing for the consideration of this Court.

*2. Plaintiff's Assignment of Error No. 1 presents no question for review here because the record shows that the ruling complained of was not in fact made by the District Court.*

As already explained, there were no witnesses in attendance when the case was tried in the District Court. Both sides submitted the testimony as given by their respective witnesses at the hearing before the Auditor in 1930. The transcript of this testimony



was on file with the Auditor's report, and the parties offered the evidence given by each witness as it appeared in the transcript, stipulating that all objections there noted should be considered as made at the trial, the Court to dispose of them at the time of the decision (R. p. 276).

No formal rulings were made upon the question of evidence stated in plaintiff's Assignment No. I, nor upon any of the objections to the admission of testimony. Counsel were advised by the trial judge, before the entry of findings, that at the request of either party he would go through the transcript of testimony and announce rulings upon all or any of the objections that had been noted, so that an adequate record might be made for review in this Court. No such request was made and no such action was taken with respect to the question stated in plaintiff's Assignment No. I, nor with respect to any other question of evidence.

Plaintiff's contention that there was a ruling upon the question sought to be reviewed here rests only upon a statement of the trial court in the course of an oral opinion upon the merits. Plaintiff's bill of exceptions explains the statement as follows (R. pp. 290-291):

“ . . . The court did not rule upon the admissibility of the evidence to which objection was offered as hereinabove noted, nor upon the objections thereto, until the time of rendering his oral opinion, when the court limited the foregoing evidence in connection with the contract to establishing the general course of the projected road to be from the town of Orofino to Headquarters, through the canyon of Orofino creek, and rejected said evidence as representations of the line and grade of said railroad or the amount and character of work to be performed under the contract.”

This Court has many times decided that error cannot be predicated upon expressions of a trial judge in an opinion or decision. *Mutual Reserve Fund Life Assn. v. DuBois*, 85 Fed. 586, *United States v. Shingle et al.*, 91 Fed. (2d) 85. Accepting literally the explanation of plaintiff's bill of exceptions, it is clear that the District Court did not rule upon or sustain any objection to the admission of the evidence referred to. There was no decision refusing to admit this testimony. The error alleged, if such a decision would have been erroneous, did not occur.

But it must not be assumed that plaintiff's Assignment lacks merely a technical requisite or that it is to be disregarded merely because of the informality of a ruling actually made. The record shows clearly

that the evidence referred to in the Assignment, so far from being excluded, was admitted and fully considered by the trial court. The findings upon the fact issues involved in the change of work claim leave no room for doubt as to this.

The evidence which the Assignment says was rejected was a letter inviting plaintiff to bid on the work, accompanied by maps, profiles, and other data (R. pp. 279-283, 375-377). Finding of Fact VI shows that all of this evidence was admitted. The Finding is a determination of the effect to be given it. It reads as follows (R. pp. 160-161):

“At the time plaintiff and others were invited to submit bids for the purpose of a proposed contract, defendant delivered to plaintiff and other prospective bidders, maps, profiles, and other data showing the proposed route of the railroad to be built as theretofore located and surveyed, with the locating engineer’s estimate of quantities of material to be removed, and other information. Such preliminary data did not purport to fix definitely the location of the line to be built or the amount or extent of construction work to be done, but did indicate the route to be followed by the proposed railroad.”

Similarly Findings VII and VIII disclose that this evidence was received and fully considered by the trial court. Finding VII compares the line as con-

structed with the location survey, and the bridges and channel changes as constructed with those shown by the preliminary data sent bidders (R. p. 161); and Finding VIII compares the volume of yardage excavated with that estimated by the locating engineer (R. pp. 161-162).

These Findings are consistent with what the trial court said in deciding the case. In discussing the question whether the work contracted for was limited to that indicated by the preliminary data, the Court said (R. p. 331):

“ . . . There is no suggestion in the contract itself nor in the other evidence before the Court that there was any plan upon the part of the Railroad Company or of the Contractor that the line should be confined to the limits of the Chamberlain survey. Insofar as evidence was admissible upon the subject at all the Court finds that there was no misrepresentation upon the part of the Railroad Company as to this proposition. The Contractor knew of the conditions and had almost as much opportunity to investigate the fitting of the line to the country through which it was laid as did the Railroad Company. Chamberlain was not an employe of the Railroad Company at the time that the line was surveyed by him and it was not responsible for his judgment. Proceeding upon this basis the Court finds no theory upon which there could be based an



award for breach of contract because the defendant misrepresented the situation of the railroad line. According to the contract the plaintiff was to be paid for its labor and material based upon the work done. To this stipulation the plaintiff is bound as part of its agreement."

Thus the oral opinion confirms what is indicated by the findings; the preliminary data sent plaintiff and other bidders was admitted and considered, and after such consideration the Court determined that there was no misrepresentation of the work to be done, since this preliminary data "did not purport to fix definitely the location of the line to be built or the amount or extent of construction work to be done, . . ." (R. p. 161.)

Plaintiff's Assignment and its bill of exceptions attempt to interpret the trial court's opinion as admitting the evidence referred to for one purpose and excluding it for another. The Assignment says that the Court qualifiedly sustained the objections,—that "the offers were rejected as representations of the line or grade . . .", the Court limiting the evidence "to establishing the general course of the projected road" and rejecting it for all other purposes (R. pp. 376-377). The bill of exceptions similarly states that the Court limited the evidence to establishing the gen-

eral course of the projected road and rejected it as representations of the line and grade of said railroad (R. p. 291).

Both the record here (the findings) and the trial court's opinion indicate clearly that the evidence in question was not excluded for any reason but was considered and its meaning and significance determined. The evidence was not rejected if by that is meant its exclusion from consideration by the trier of fact. It was rejected only in the sense that it was not accepted as proving what plaintiff thought it proved.

Plaintiff's grievance is that the Court did not decide in its favor the question of fact to which this evidence was addressed. In effect, its Assignment of Error attempts to challenge what the trial court did in passing upon the testimony. Plaintiff's bill of exceptions indicates that no record was made upon which the decision of the fact issue could be reviewed here, and plaintiff does not profess to be seeking any such review.

In this state of the record, the question raised by defendant's objection to the admission in evidence of the preliminary data sent bidders is not open to consideration here. Since the evidence was



in fact admitted and considered by the District Court, we can find no reason for engaging here in a discussion of its admissibility.

## II

### COMMERCIAL HAUL CLAIM

1. *The question of pleading presented by plaintiff's Assignment of Error No. II is not reviewable here because the relief sought (a direction to enter judgment for an increased amount) cannot be granted upon the record before this Court.*

Plaintiff's Assignment of Error No. II asserts that the District Court erred in excluding an issue as not pleaded. Plaintiff does not ask that the judgment be reversed or that the case be remanded to the District Court for a trial of this issue. The contention seems to be that if the issue had been considered as among those pleaded, it would have been decided in plaintiff's favor. This is what is implied by the Assignment, which says that the District Court excluded the issue "therefore limiting plaintiff's recovery" (R. p. 377).

Plaintiff's brief, on the other hand, seems to contend that the District Court in fact decided the question, by what was said in certain of the findings (Cross-Appellant's Brief, pp. 23-24); and this

Court is asked to apply the rule of *City of Fort Scott v. Hickman*, 112 U. S. 150 (followed by this Court in *United States v. Stamey*, 48 Fed. (2d) 150), under which an appellate court, upon reversing the judgment of the lower court, may direct the entry of the proper judgment, providing there is in the record a finding upon every controverted issue in the case.

Assuming that plaintiff's cross-appeal is adequate to invoke this revisory power, notwithstanding the fact that reversal of the judgment is not sought (*Empire Fuel Co. v. Lyons*, 257 Fed. 890, 898), and assuming also that the District Court incorrectly excluded an issue properly pleaded, was that issue nevertheless fully decided in plaintiff's favor by the findings made, so that this Court (if it accepts plaintiff's theory of the contract) may direct the entry of a new and different judgment appropriate to such decision?

A statement of the question immediately suggests the answer. The District Court expressly refrained from deciding the issue which was held not to have been pleaded, *because* it was not pleaded. This is what is meant by the statement upon the subject in Finding XVIII (R. pp. 169-170); and it is made

additionally clear by the explanation in the oral opinion (R. p. 339).

The District Court held with plaintiff that the contract between the parties provided not only for the construction of a railroad, but for the conduct of transportation operations thereon, after the track was laid and while the supplemental finishing work was being done. The contract specified September 1, 1927, as the date upon which all work was to be concluded. Plaintiff did not finish the work at this date, but continued until October 25, 1927.

Finding XVI determined that defendant permitted plaintiff to continue the construction work beyond the stipulated time, but that defendant did not permit plaintiff to conduct hauling operations at any time after July 17, 1927, when defendant took over the first 29 miles of the line (R. p. 168). And in Finding XVIII the Court held that "plaintiff was entitled to conduct the commercial haul only until September 1, 1927, when the contract was to have been finished; . . . that the right to conduct commercial haul terminated on that date" (R. p. 169). The Finding then concluded with the ruling to which the Assignment here relied on is addressed, as follows (R. pp. 169-170):

“The Court further finds that plaintiff’s pleadings do not present the issue of defendant’s conduct extending the time to complete the contract beyond September 1, 1927.”

Plaintiff, in assigning only a procedural error, and at the same time seeking to avoid a retrial of the issue, puts itself in a difficult position. To justify its request that this Court direct the entry of a new judgment, it is contended that the District Court in result decided the issue which it professed to exclude,—that the District Court found there was some conduct on the part of defendant which served to extend the time for hauling commercial traffic. This contention is made notwithstanding the specific ruling above referred to that defendant did not extend the commercial haul period, and that plaintiff’s right to handle this traffic ended September 1, 1927, which rulings stand unchallenged in this Court.

The contention perhaps misunderstands what was intended by the District Court on the subject of an implied extension. The contract bound plaintiff to complete all work by September 1, 1927, and (according to the Court’s interpretation) it gave plaintiff the right to handle the profitable log traffic up to that date. Plaintiff failed to complete the work within the time specified. Defendant did not insist upon its

rights under the contract, but permitted plaintiff to take additional time to complete the construction work. Nothing else appearing, the Court held that the failure to take advantage of plaintiff's breach did not operate as a grant of additional time to plaintiff in which to conduct the profitable log hauling operations. Whether anything done by defendant had contributed to the delay in the construction work, and whether by reason thereof defendant might have been precluded from claiming that the delay in completing the work was a breach of the contract, were questions not considered because not pleaded. The Court said in its oral opinion (R. pp. 339-340):

“The contract ended by its terms September 1st, 1927, but the road was to have been turned over to the operating department of the Railroad Company by that date. The Contractor breached its obligation to do so. However, the delays and extra expense caused by the Railroad Company might well have been used as a defense for such a claim by the defendant. It, however, does not even raise the point. On the other hand, the plaintiff can not rely upon its own breach or the sufferance of the defendant in permitting it to complete the work by remaining until October 25th as extending to that time the profitable log haul stipulation in the



agreement, where the hauling of the logs had already been taken over by the Railroad Company."

Briefly stated, the question which the Assignment says was pleaded, and which plaintiff's brief says was decided in its favor, is this: Was defendant responsible for the delay in completing the construction work, and did the extension of the time for that work carry with it a like extension of the commercial haul privilege?

An examination of the findings entered will disclose at once that the District Court nowhere determined that defendant was responsible for plaintiff's inability to complete the work within the contract period. There is no intimation in any of the findings that defendant was at fault in this respect. On the contrary, the findings specifically determined that defendant was within its rights under the contract in requiring the additional work, and the changes from the location survey, which plaintiff says caused the delay (R. pp. 160-162). The District Court did not hold, and upon these findings could not hold, that plaintiff had any right to the additional time given it to complete the construction work, or that defendant had in any way surrendered its right to restrict the log hauling privilege (if there was any such



under the contract) to the period fixed by the contract.

Plaintiff's argument seems to assume that the permission given plaintiff to continue construction work beyond the contract period carried with it an extension of the log hauling privilege. It is urged that there was a waiver of the time limit imposed by the contract, and that this waiver impliedly extended the period within which the contractor could handle the commercial log traffic.

This argument ignores the fact that the only thing defendant waived was its right to have the construction work finished by September 1, 1927. Findings XVI and XVII are to the effect that defendant acquiesced in the continuance of track work on a part of the line after the contract date, but did not agree to any extension of the commercial haul privilege; and the Court held (in Finding XVIII) that the right to conduct commercial haul terminated on September 1, 1927 (R. pp. 168-169). These Findings are not challenged here.

It is therefore settled that there was no voluntary extension by defendant of the term for handling commercial traffic. The question we are concerned with here, and which plaintiff's Assignment says was pleaded, was whether defendant had done anything to

bring about an involuntary extension, despite its intention to the contrary. Whether pleaded or not, this question certainly was not passed upon or decided in plaintiff's favor by the District Court, and there is no record here upon which a new or different judgment could be entered.

*2. Plaintiff's pleadings do not present the question whether conduct on the part of defendant entitled plaintiff to additional time, not only to complete the construction, but also to handle log traffic, under the commercial haul clause of the contract.*

The question for consideration here is whether or not the District Court erred in making the following ruling, as a part of Finding of Fact XVIII (R. pp. 169-170):

“The Court further finds that plaintiff's pleadings do not present the issue of defendant's conduct extending the time to complete the contract beyond September 1, 1927.”

We restate briefly the facts necessary to an understanding of this question:

The contract between the parties obligated plaintiff to complete the construction of the railroad by September 1, 1927 (R. p. 52). On July 17, 1927, after track had been laid on the first 29 miles of the line, and before completion of all work that might have

been required, defendant stopped work on this part of the line and took possession thereof, in order to begin log transportation thereon. Plaintiff was directed to proceed with the completion of the work on the remainder of the line (R. pp. 165-166). Thereafter and on October 7, 1927, a similar direction was given to stop work upon another portion of the line, but to proceed with the completion of the remainder (R. pp. 166-167). All work by plaintiff was discontinued on October 25, 1927, but defendant's Engineering Department continued track finishing work until December 31, 1927, when the line was turned over to defendant's Operating Department (R. pp. 166-168).

Plaintiff's complaint alleged that defendant's action in taking over a part of the line on July 17, 1927, was a breach of contract and that the log traffic accepted and moved by defendant after that date would have been handled by plaintiff as commercial haul, if the contract had not been so breached (R. pp. 19-21). The complaint alleged that this right to handle log traffic continued not only to October 25, 1927, when all construction work by plaintiff ceased, but to December 31, 1927, when the line was turned over to defendant's Operating Department (R. pp. 20-21).

The District Court held that the contract gave plaintiff the right to handle this log traffic as com-

mercial business under the contract up to the date specified in the contract for completing the construction work, September 1, 1927, but found that there had been no extension of that right beyond the contract date (R. pp. 168-169). This ruling is not challenged here, but it is contended that the Court should have considered whether conduct on the part of defendant entitled plaintiff to continue handling the log traffic up to the time all construction work by plaintiff ceased, October 25, 1927. The original contention that the alleged right continued to December 31, 1927, seems to have been abandoned. (Cross-Appellant's Opening Brief, pp. 23-24.)

While plaintiff undoubtedly alleged in its complaint that its supposed right to conduct log transportation operations continued beyond the contract date, September 1, 1927, it is quite clear that the pleader had no thought in mind of an involuntary extension forced upon defendant by some act or omission on its part. The theory of the complaint is that because of changes in the work (made pursuant to a right reserved in the contract), the parties by agreement changed the contract date for all purposes (R. p. 20).

This theory was not accepted by the District Court. Its finding was that defendant merely excused plaintiff's default in not completing the construction work



in time; and the Court held that this could not have been intended as an extension of the commercial haul privilege, since defendant had theretofore declared that beginning July 17, 1927, plaintiff would not be permitted to do any work or conduct any operation upon the part of the line taken over (R. pp. 168-169, 339-340).

The Court's oral opinion noted that defendant had not made any point of plaintiff's failure to complete the work in time, and suggested that if the point had been raised, delays and extra expense caused by defendant might have been relied upon by plaintiff as an excuse (R. p. 339). Presumably as a result of this suggestion, there was included in the findings the statement that "plaintiff's pleadings do not present the issue of defendant's conduct extending the time to complete the contract beyond September 1, 1927." (R. pp. 169-170).

Plaintiff's theory, as stated in its complaint, cannot be altered to fit this suggestion of the trial court. Instead of pleading that actions or conduct of defendant made performance within the time limit impossible, and that by reason thereof plaintiff became entitled to an extension of the contract for all purposes, the complaint alleged that defendant "per-

mitted plaintiff without objection to extend the time of completion," because defendant theretofore had made changes in the work (under an appropriate provision of the contract) which resulted in extra costs and delay (R. p. 20).

It should be kept in mind that the paragraphs of the complaint on this subject refer primarily to the claim that plaintiff was entitled to recover additional compensation for the construction work because of changes in the work contracted for, under the provisions of the contract permitting changes and authorizing additional allowances therefor in the judgment of the Chief Engineer. It was the increased cost of doing the work and not the extra time required that was emphasized. Indeed, it was alleged that because of the requirement for completing the work "approximately on the schedule provided in said contract," the excavation could not be delayed for good weather but went ahead in winter under adverse weather conditions (R. pp. 9-10).

The same claim is made in paragraphs IX and XI of the complaint with references to other phases of the work. The changes required were said to have delayed the contractor's program, with the result that much difficult work had to be done in the win-



ter season in order to avoid substantial delay in completing the construction of the railroad (R. pp. 13, 15-16). These were not allegations excusing delay and claiming the right to additional time for completing the work; they were claims of increased construction costs because of the necessity of doing the increased work without any substantial delay beyond the time limit imposed by the contract.

When the complaint comes to the claim for breach of contract in depriving plaintiff of the supposed right to handle the log traffic, all that is said on the subject of an extension is that "because of the matters and things hereinbefore alleged, defendant permitted plaintiff without objection to extend the time of completion" (R. p. 20). This seems to assume that an extension of time for completing the construction work would automatically extend the period for handling commercial business. This might be the case if what was meant was the hauling of commercial cars in work trains while the contractor was engaged in actual construction work.

But plaintiff's commercial haul claim proceeds upon a very different theory. The contract is read as granting plaintiff the right to handle all commercial traffic during a fixed period, entirely independ-

ent of the construction work and the work train service operated in connection therewith. This was a valuable right, and not a mere incident of the construction job, according to the complaint; so much so that (as it is claimed) plaintiff counted heavily on the profit to be made therefrom in making its bid for the work (R. p. 19).

It is a necessary limitation of this theory that any such valuable right would not be enlarged or continued in effect by implication, or because defendant excused plaintiff's breach in failing to complete the construction work on time. As pointed out by the trial court (R. pp. 339-340), plaintiff "can not rely upon its own breach or the sufferance of the defendant," as bringing about an extension of rights or privileges claimed under other provisions of the contract.

The complaint pleaded merely that defendant did not object to the additional time taken in completing the construction work. The trial court suggested that plaintiff might have pleaded delays and extra expense attributable to defendant as entitling plaintiff to the additional time, and perhaps also to an extension of all its rights and privileges under the con-

tract. No such contention appears in the complaint, and the finding that there was no such issue pleaded (R. pp. 169-170) is not open to attack.

### III

#### COMMERCIAL HAUL CLAIM— ALLOWANCE OF INTEREST

*Interest is recoverable in breach of contract actions, not as interest, but as part of the damages. The equivalent of interest may thus be included in a verdict or finding in certain cases, but its inclusion or exclusion is dependent upon the discretion of the trier of fact in determining the amount of damages required to compensate the injured party.*

Plaintiff's Assignment of Error III does not indicate what specific ruling of law made by the District Court is challenged. The Assignment says merely that the Court erred "in refusing to allow interest on the award against defendant for wrongfully taking from plaintiff the commercial or log haul during construction" (R. p. 383). Exceptions had been taken, both to the finding which fixed the damages without interest, and to the conclusion of law specifying the amount of recovery on this item, without interest (R. pp. 322-323).

No ruling had been requested during the trial that plaintiff was entitled to interest upon whatever award might be made upon this breach of contract

claim. Plaintiff's requested conclusion of law upon the subject of interest merely asked for a ruling that plaintiff was entitled to recover interest on all sums which should have been certified as due in a final estimate on February 1, 1928 (R. p. 325).

We understand plaintiff's argument to be that the damage award of \$125,000 must be considered the same as a payment due under the contract, and that since all contract payments should have been made not later than February 1, 1928, the District Court was required, as a matter of law, to include interest upon the award from this date to the entry of judgment.

The premise of this argument is entirely unsound. Plaintiff did not haul log cars for defendant between July 17, 1927, and September 1, 1927, and nothing whatsoever was due plaintiff for any such service under the contract on February 1, 1928, or at any other time. Defendant refused to allow plaintiff to perform the service. If that refusal was a breach of contract, plaintiff became entitled to recover as damages such sum as a court or jury might fix as necessary to compensate it for its loss.

The District Court's finding was such a damage award, and was not in any sense a determination that the sum specified was a payment due under the terms

of the contract. Having held that plaintiff had been wrongfully deprived of the opportunity to handle commercial traffic at \$1 per car mile, the Court undertook to ascertain the extent of the loss sustained. There was a conflict of evidence as to how much hauling would have been done and also as to what the operation would have cost plaintiff. The Court adopted plaintiff's view that but for the alleged breach, plaintiff would have handled as commercial haul under the contract all of the log traffic which defendant in fact accepted and transported. The precise number of cars moved (prior to September 1, 1927,) was not shown. The Court's finding as to this is based upon testimony showing the amount of tonnage handled by defendant from the beginning of its operations to October 25, 1927, and up to December 31, 1927. Upon the question of plaintiff's probable operating costs, there was evidence from which the Court reached a conclusion as to what would have been expended in these longer periods; and without attempting to compute the net result with mathematical accuracy, the Court found that plaintiff "was damaged in the sum of \$125,000 by being deprived thereof (of the commercial haul) up to September 1, 1927." (R. p. 169.)



An explanation of this appears in the oral opinion of the District Court as follows (R. p. 340):

“But, although figures were presented in detail for other periods, there is no accounting as to the number of logs hauled by the Railroad Company between June 1st and September 1st. The Court, however, must arrive at some conclusion as to the logs, and therefore assesses the damages for breach of this clause of the contract at \$125,000.”

It is apparent, therefore, that neither the amount sued for, nor the amount awarded as damages, can be considered as moneys due plaintiff at the conclusion of the construction job. What plaintiff lost, according to its contention, was an opportunity to make a profit in operating log trains. Neither of the factors required for the determination of this profit (the gross receipts and the operating costs) was an ascertained or a definite figure. The District Court, even upon plaintiff's theory (that the tonnage actually moved by defendant in its own operation indicated what it would have called upon plaintiff to move as “commercial haul”), found it necessary to estimate the amount of traffic for the particular period; and to reach a conclusion as to the deductible operating costs, it was necessary first to choose between the conflicting cost estimates of the parties

for the longer periods, and then to adapt the one chosen to the shorter period. The result was an approximation, equivalent perhaps to a jury verdict.

It is not open to question that unless required by state law, under the Rules of Decision Act (28 U. S. Code Ann. Sec. 725), a damage award thus made by a jury, or by a court sitting without a jury, is not to be increased by adding interest prior to judgment. A jury may be permitted, in a breach of contract action, to include the equivalent of interest as part of the damages awarded, when necessary, in the judgment of the jury, to make the award fairly compensatory. But this is discretionary with the trier of fact and cannot be compelled as a matter of law. *Miller v. Robertson*, 266 U. S. 243, 258; *Concordia Insurance Co. of Milwaukee v. School District No. 98*, 282 U. S. 545; *Barrett v. Panther Rubber Mfg. Co.*, 24 Fed. (2d) 329, 337; *Gasoline Products Co., Inc., v. Champlin Refining Co.*, 39 Fed. (2d) 521.

These and many other decisions of Federal Courts settle that where the question is unaffected by state law, and the demand is for damages the amount of which is to be determined at the trial, interest upon

the award made cannot be claimed as a matter of right. Plaintiff apparently recognizes this. Its brief attempts to characterize the claim as a liquidated demand, due under the contract for services performed, notwithstanding the fact that there were no such services. What plaintiff sought in its complaint, and what the Court awarded were not payments due under the contract, but damages for the alleged breach; and the amount of these damages could not be determined until the Court had weighed the evidence and ascertained the extent of the loss attributable to the alleged breach.

But the question of allowance of interest is not unaffected by the law of the state. Federal jurisdiction was invoked because of diversity of citizenship, and the substantive law of the case is not controlled by any Federal statute or rule. (*Compare Chicago, M., St. P. & P. R. Co. v. Busby*, 41 Fed. (2d) 617.) In these circumstances, the question of interest on a damage award is generally held to be governed by state law. *George M. Jones Co. v. Canadian Nat. Ry. Co. et al.*, 14 Fed. (2d) 852; *Jones v. Foster*, 70 Fed. (2d) 200, 206.

We come then to the question whether the Oregon interest statute as interpreted by the State Su-

preme Court requires the addition of interest prior to judgment upon the District Court's award of damages. We understand plaintiff to so contend; it is not claimed that the Court, as a trier of fact, failed to make a large enough award, but that the Court, after deciding this fact issue, was required by law to include in the judgment interest from the date when payments under the contract became due.

The present Oregon statute (Oregon Code Ann. Sec. 57-1201) provides that interest shall be payable "on all moneys after the same becomes due." Prior to the amendment adopted in 1917 (General Laws of Oregon, 1917, Ch. 358), this provision in the statute was limited to certain specifically enumerated types of obligation. *Sargent v. American Bank and Trust Co.*, 80 Or. 16, 38, 154 Pac. 759, 156 Pac. 431. The amendment removed this limitation so that interest is now payable on all money obligations after their due date.

But the Supreme Court of Oregon has uniformly held, both before and after the 1917 amendment, that unliquidated damages for breach of contract cannot be classed as moneys due within the meaning of the interest statute. It is recognized that interest may sometimes be allowed as damages (*Lives-*

*ley v. Johnston*, 48 Or. 40, 53, 84 Pac. 1044, 1049), but the addition of interest after the damages have been ascertained and fixed has never been allowed.

In *Williams v. Pacific Surety Co.*, 77 Or. 210, 146 Pac. 147, 149 Pac. 524, an action for damages for breach of a contract to furnish logs to a sawmill, the court (at page 221) said:

“There is no controversy about the nature of this action. It is for unliquidated damages, and the rule is well settled in this state that interest cannot be recovered thereon: *Hawley v. Dawson*, 16 Or. 348 (18 Pac. 592); *Pengra v. Wheeler*, 24 Or. 532 (34 Pac. 354, 21 L. R. A. 726); *Smith v. Turner*, 33 Or. 381 (54 Pac. 166). The court erred in giving judgment for interest.”

In *Duncan Lumber Co. v. Willapa Lumber Co.*, 93 Or. 386, 182 Pac. 172, 183 Pac. 476, an action for breach of contract to deliver merchandise, the damages were in fact ascertainable in advance. The amount awarded represented the difference between the contract price and the market price at the time and place of delivery. The jury was permitted to add interest. In modifying the judgment to exclude the interest, the court said (p. 400):

“It is also contended that the court erred in permitting the plaintiff, during the trial, to amend its complaint by adding thereto a demand for



interest, and submitting to the jury the question of interest. This question is settled beyond further discussion in this state, in favor of defendant's position."

See also *Propst v. William Hanley Co.*, 94 Or. 397, 185 Pac. 766, in which the allowance of interest upon an award of damages for breach of contract was held to be error. The court said (p. 404):

"The cases of *Williams v. Pacific Surety Co.*, 77 Or. 210 (146 Pac. 147, 149 Pac. 524), and *Sargent v. American Bank and Trust Co.*, 80 Or. 16 (154 Pac. 759, 156 Pac. 431), settled the matter of interest adversely to the plaintiff, so that the court was in error in directing the jury to allow interest on the amount from the time of the breach up to the day of trial."

Both of the cases last cited were decided after the 1917 amendment to the interest statute. A more recent case declaring the same rule is *Obermeier v. Mortgage Co. Holland-America*, 123 Or. 469, 259 Pac. 1064, 260 Pac. 1099, 262 Pac. 261. In this case the court said (123 Or. 480):

"It is to be borne in mind that this is an action to recover damages for the breach of a contract. It is so denominated in the complaint and in the brief of counsel for respondent. If plaintiff in any event is entitled to interest it is by reason of the fact that it is a part of the damages sustained. The jury found that the plaintiff was

damaged in the sum of \$1,400. It was unquestionably error for the trial court to increase the amount of damages by awarding plaintiff interest from the date of the execution of the lease."

So far as we have been able to find, the Supreme Court of Oregon has never sanctioned the addition of interest to an award of damages for breach of contract. The amendment in 1917 does not touch the question because of the uniform holding that damages in breach of contract actions cannot be considered as moneys due within the meaning of the interest statute. All of the Oregon cases cited by plaintiff as indicating that a different rule was established by the amendment of the statute involve claims for moneys due on contract. This is true also of *New York Alaska Gold Dredging Co. v. Walbridge*, 38 Fed. (2d) 199, decided by this Court in 1930. Plaintiff's brief says of the case, "The issue was about the same as in the case at bar." (Cross-Appellant's Opening Brief, p. 29.) The claim in the *Walbridge* case was for money loaned and for salary due under the terms of an employment contract.

We submit, therefore, that the Oregon rule, so far from requiring the addition of interest to the damage award made, forbids any such allowance. The decisions of the Oregon Supreme Court, thus in-

interpreting the interest statute upon which plaintiff necessarily relies, are controlling here. But if for any reason the question is not foreclosed by the Oregon decisions, the result is the same. The allowance of interest, or its equivalent, was within the discretion of the trial court; its decision refusing to add interest to the damages awarded is not open to attack upon plaintiff's cross-appeal.

Occasional statements in plaintiff's brief give the impression that plaintiff may be asking this Court to exercise a discretionary judgment upon the question of adding interest in order to make the damage award fully compensatory. We shall not undertake to argue the merits of this question. If we are wrong in our assumption that the discretionary power to allow or withhold interest belonged to the District Court as a trier of fact, and if, upon any theory, its exercise of discretion is reviewable here, we need only add that the District Court had the entire record before it, and was in much the better position to determine whether substantial justice required the allowance of interest. It may well be inferred that the decision against the allowance of interest was influenced to some extent by facts known to the trial judge, explaining the long delay to which the litigation has

been subjected. Some hint of this is given by what was said in the oral opinion; the Court noted that the case was once set for dismissal under the rule requiring some action to be taken in a cause within a year (R. p. 330).

#### IV

##### BRIDGE MATERIAL CLAIM—ALLOWANCE OF INTEREST

*Plaintiff having sued for damages for breach of contract and not for moneys due and payable under the contract, interest could only be allowed as part of the damages. The damages having been ascertained and fixed by the trial court, without interest, the applicable state rule forbids increasing the damages by adding interest.*

Plaintiff's Assignment of Error IV complains of the refusal of the District Court to add to its award of damages for alleged breach of the provisions of the contract applicable to the haul of bridge materials, interest from the time when payments under the contract became due and payable.

We pointed out in discussing plaintiff's Assignment of Error III that in an action such as this, where no federal right is asserted, the Rules of Decision Act (28 U. S. Code Ann. Sec. 725) requires

adherence to the law of the state, and that the Oregon interest statute has uniformly been interpreted as not requiring, or indeed permitting, the allowance of interest upon an award of damages for breach of contract.

The question here involved differs from that presented by Assignment III only in that here plaintiff had a choice of remedies. Suit could have been brought on the contract to recover the amounts payable at the "hauling" rate claimed to be applicable, less what had already been paid by defendant. Instead, plaintiff chose to sue for damages for the alleged breach, including the claim with several others which combined to make up a demand for damages in the total sum of \$691,874.66 (R. p. 24).

The District Court took the position that under the Oregon rule the form of action chosen controlled the question of interest. The Court said (R. pp. 341-342):

"The Court, as it stated at the outset, considers this an action on the contract for damages and for breach thereof. It is not an action for amounts due under a written contract. If this were true a great many of the questions involved in the complaint could not have been tried or considered. The Court therefore feels



that under the Oregon statute it is not bound to allow interest from the date of final estimate but rather is required to allow interest only from the date of entry of the judgment in damages.”

Plaintiff apparently does not challenge the correctness of the Court’s characterization of its complaint. The opening statement of the brief avoids making any commitment as to the nature of the cause or causes of action asserted. (Cross-Appellant’s Opening Brief, pp. 2-6.) In the discussion of the interest question the claims are referred to as demands for money due under the contract, but the point made seems to be that interest should be allowed despite the fact that the action is one for breach of contract. (Cross-Appellant’s Opening Brief, pp. 26-27, 33, 35-41.)

Whatever may be the rule elsewhere, it is clear that in Oregon interest is not collectible upon damage awards in any kind of breach of contract action. The distinction plaintiff seeks to draw between liquidated damages, or damages susceptible of ascertainment by some definite standard, and damages not so liquidated or ascertainable, has never been recognized by the Supreme Court of Oregon. On the contrary, the cases since 1917 (when the interest statute

was broadened), indicate clearly that in any breach of contract action the damages sought, whether easily ascertainable or not, cannot be considered as moneys due under the provisions of the interest statute. The jury may in some instances be permitted to include the equivalent of interest as part of the damages sustained, but the damage award itself is not in the category of moneys which became due or upon which interest can be allowed under the statute.

In *Duncan Lumber Co. v. Willapa Lumber Co.*, 93 Or. 386, 182 Pac. 172, 183 Pac. 476, the damages sought were, if not liquidated, readily ascertainable. Defendant had refused to deliver a quantity of lumber and the damages claimed represented the difference between the contract price and the market price at the time when delivery should have been made. In reversing an allowance of interest upon the damage award, the court said that the question had been settled "beyond further discussion in this state." (93 Or. 400.)

Similarly in *Propst v. William Hanley Co.*, 94 Or. 397, 185 Pac. 766, the damages sought for breach of contract represented the difference between the contract price and the market value of the commodity which should have been delivered. A direc-

tion to the jury to allow interest on the amount from the time of the breach up to the time of trial was held erroneous.

In *Obermeier v. Mortgage Co. Holland-America*, 123 Or. 469, 259 Pac. 1064, 260 Pac. 1099, 262 Pac. 261, the Supreme Court of Oregon again held that a damage award could not be increased by adding interest even though the jury might have been permitted to consider the equivalent of interest in arriving at the amount of the verdict. The action was one for breach of a lease. The jury apparently awarded the plaintiff the net amount of advance rentals paid, and the trial court then undertook to add interest from the date of the lease. The Supreme Court applied the rule of the earlier cases, holding that since the action was one to recover damages for breach of a contract, the trial court had no power to increase the jury's allowance by adding interest. The court said (123 Or. 480):

"It is to be borne in mind that this is an action to recover damages for the breach of a contract. It is so denominated in the complaint and in the brief of counsel for respondent. If plaintiff in any event is entitled to interest it is by reason of the fact that it is a part of the damages sustained. The jury found that the plaintiff was damaged in the sum of

\$1,400. It was unquestionably error for the trial court to increase the amount of damages by awarding plaintiff interest from the date of the execution of the lease.”

It has always been the rule in Oregon that after the breach of a contract, interest is not recoverable except as damages. *Seton v. Hoyt*, 34 Or. 266, 55 Pac. 967. The cases just cited demonstrate that this rule has not been changed by the amendment to the interest statute in 1917. If the jury, or the court sitting without a jury, fixes the damages without including anything as the equivalent of interest, the verdict or finding is conclusive, and the amount allowed cannot be increased by adding interest prior to judgment.

We submit that the question of interest, or its equivalent as an element of damages, upon the award made, was one for the District Court sitting as a trier of fact. If there was a breach of the contract with respect to the payment for hauling bridge materials, which we deny, the District Court's decision as to the amount of damages sustained cannot be increased here by adding interest prior to judgment.

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